

## CHAPTER 2: RIGHT TO PRIVACY

### 2.1 Recognition of the right to privacy

2.1.1 Privacy is a valuable and advanced aspect of personality. Sociologists and psychologists agree that a person has a fundamental need for privacy.<sup>1</sup> Privacy is also at the core of our democratic values.<sup>2</sup> An individual therefore has an interest in the protection of his or her privacy.

2.1.2 Although privacy concerns are deeply rooted in history,<sup>3</sup> privacy protection as a public policy question can be regarded as a comparatively modern notion. The right to privacy has, however, become one of the most important human rights of the modern age and is today recognised around the world in diverse regions and cultures.<sup>4</sup>

2.1.3 The modern privacy benchmark at an international level can be found in the 1948 Universal Declaration of Human Rights,<sup>5</sup> which specifically protects territorial and communications privacy.<sup>6</sup>

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1 **Neethling's Law of Personality** at 29.

2 Preserving privacy fosters individual autonomy, dignity, self-determination, and ultimately promotes a more robust, participatory citizenry. A watched society is a conformist society. Unwanted exposure may lead to discrimination, loss of benefits, loss of intimacy, stigma, and embarrassment: see Goldman J "Health at the Heart of Files?" Brandeis Lecture delivered at the Massachusetts Health Data Consortium's Annual Meeting and made available at the 23<sup>rd</sup> International Conference of Data Protection Commissioners in Paris in 24-26 September 2001 (hereafter referred to as "Goldman") at 2. See also the discussion in Kang J "Information Privacy in Cyberspace Transactions" 50 **Stanford Law Review** April 1998 1193 at 1212-20 where the counter values against control over personal information are described as commerce (better information leads to better markets) and truthfulness (privacy can be used to deceive and defraud). In so far as the second value is concerned it should however be noted that the conscious concealment of personal information does not always amount to lying: the hallowed example is the secret ballot.

3 See **Neethling's Law of Personality** at 42,45,46 for the position in Roman and Roman-Dutch law; EPIC and Privacy International **Privacy and Human Rights Report** 2002 at 5 refers to the recognition of privacy in various religions: the Qur'an an-Noor (24:27-28 (Yusufali); al-Hujraat 49:11-12 (Yusufali) and in the sayings of Mohammed ( Volume 1, Book 10, Number 509 (Sahih Bukhari); Book 020, Number 4727 (Sahih Muslim); Book 31, Number 4003 (Sunan Abu Dawud). The Bible has numerous references to privacy. See also reference to Moore B **Privacy: Studies in Social and Cultural History** 1984. Jewish law has long recognised the concept of being free from being watched. See reference to Rosen J **The Unwanted Gaze** Random House 2000. Privacy was also protected in Classical Greece and ancient China.

4 In many countries privacy is now protected by constitutional guarantees or general human rights legislation: Examples of countries that recognise a right to privacy in their Constitution, other than South Africa (sec 14 of the Constitution), are eg the Kingdom of the Netherlands (Constitution of the Kingdom of the Netherlands, 1989), Republic of the Philippines (art III, Constitution of the Republic of the Philippines, 1987), Russian Federation ( art 23, Constitution of the Russian Federation, 1993). While the Constitution of the United States of America does not contain an explicit right to privacy, the Courts in that country, going back as far as 1891 (**Union Pacific R.R Co v Botsford**, 141 US 251 11 S.Ct 1000, 35 L.Ed 734(1891) have interpreted the Constitution as providing a right to personal privacy. The UK has recently enacted general human rights legislation that protects the right to privacy in their Human Rights Act, 1998 (UK).

5 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948.

2.1.4 The right to privacy is also dealt with in various other international instruments,<sup>7</sup> such as the United Nations Convention on the Rights of the Child,<sup>8</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>9</sup> and the United Nations Convention on Migrant Workers.<sup>10</sup>

2.1.5 On a regional level, a number of treaties make this recognition of the right to privacy legally enforceable.

- a) Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950<sup>11</sup> states:
- (1) Everyone has the right to respect for his private and family life, his home and his

6 Art 12 of the United Nations Universal Declaration of Human Rights, 1948 provides:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

According to Burchell JM *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* Juta Cape Town 1998 (hereinafter referred to as "Burchell *Personality Rights*") at 371, the word 'arbitrary' points towards some acceptance that certain invasions of privacy may be regarded as reasonable and others as unreasonable. In fact, the Universal Declaration recognises limits to the exercise of rights. These limits are defined as those 'determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society' (art 29).

7 See generally Rotenberg M (ed) *The Privacy Law Sourcebook: United States Law, International Law and Recent Developments* EPIC 2001.

8 United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990. Art 16 of the United Nations Convention on the Rights of the Child, 1989 provides:

1. No child shall be subject to arbitrary or unlawful interference with his or her privacy, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

9 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23 1976. Art 17 provides as follows:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

10 Art 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of December 18, 1990.

11 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS no: 005) open for signature November 4, 1950, entry into force September 3, 1950.

correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

- b) The American Convention on Human Rights<sup>12</sup> (Art 11,14) and the American Declaration on Rights and Duties of Mankind<sup>13</sup> (Art V,IX and X) contain provisions similar to those in the Universal Declaration and International Covenant.

It is, however, interesting to note that the African Charter on Human and People's Rights<sup>14</sup> does not make any reference to privacy rights.<sup>15</sup>

2.1.6 The European Convention furthermore created the European Commission of Human Rights and the European Court of Human Rights to oversee enforcement. Both have been active in the enforcement of the right to privacy and have consistently viewed article 8's protection expansively and interpreted the restrictions narrowly.<sup>16</sup>

2.1.7 In South Africa the right to privacy is protected by both our common law<sup>17</sup> and the Constitution.<sup>18</sup> The Constitutional Court<sup>19</sup> has emphasised the interdependency between the

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12 Pact of San Jose, Costa Rica 22 November 1969 entered into force on 18 July 1978.

13 Approved by the Ninth International Conference of American States, Bogota, Columbia, 1948.

14 Adopted June 27 1981 OAU Doc. CAB/LEG/67/3 rev.5,21 I.L.M. 58 (1982) entered into force Oct.21 1986.

15 Gutwirth S (translation by Casert R) *Privacy and the Information Age* Rowman & Littlefield Publishers Lanham 2002 suggests that in the African context "the solution to individual conflicts is subordinate to safeguarding the stability of the social context". The status of the individual is limited. Everyone is expected to be part of different, strictly hierarchical communities. It is with the development of industrialisation on a wide scale, that the concept of privacy develops.

16 Strossen N "Recent United States and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis " 41 *Hastings Law Journal* 805 (1990) as referred to in EPIC and Privacy International *Privacy and Human Rights Report* 2002 at 7 and the references made therein.

17 See *Neethling's Law of Personality* ch 8.

18 See discussion below.

19 *Bernstein ao v Bester NO ao* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at 787 ff.

common law and constitutional right to privacy. A fundamental issue at stake, however, concerns the extent to which the Bill of Rights has application in common law disputes.

2.1.8 The Constitution is the supreme law of South Africa and any law or conduct inconsistent with it is invalid (sec 2). Certain fundamental rights - to which juristic persons are also entitled to the extent required by the nature of the right and the nature of a particular juristic person(sec 8(4)) - are entrenched in chapter 2 (the Bill of Rights). The Bill is applicable to all law - therefore also the common law relating to the right to privacy - and binds not only the State (sec 8(1)) but also, if applicable, natural and juristic persons (sec 8(2)). This vertical and horizontal application of the Bill can take place directly or indirectly.<sup>20</sup>

2.1.9 Direct vertical application means that the State must respect (or may not infringe) the fundamental rights except in so far as such infringement is reasonable and justifiable in terms of the limitation clause (sec 36(1)). Direct horizontal application connotes that the courts must give effect to applicable fundamental rights by applying and developing the common law to the extent that legislation fails to do so, except where it is reasonable and justifiable to develop the common law to limit the relevant right(s) in accordance with the limitation clause (secs 8(3) and 36(1)).<sup>21</sup>

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20 See Neethling J, Potgieter JM & Visser PJ *Law of Delict* Butterworths Durban 2002 (hereafter referred to as "Neethling, Potgieter & Visser *Delict*") at 19-23; *Neethling's Law of Personality* at 73-74; Cockrell A "Private Law and the Bill of Rights: A Threshold Issue of "Horizontality"" *Bill of Rights Compendium* Butterworths Constitutional Law Library (hereafter referred to as "Cockrell *Bill of Rights Compendium*") at paras 3A4-3A10.9.

21 A court may therefore be required to consider whether infringement of a fundamental right by a common law rule which serves to protect another right can be justified in terms of the general limitation clause (Cameron J in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 606-607).

2.1.10 By the indirect operation of the Bill of Rights is meant that all legal rules, principles or norms - including those regulating the law relating to the right to privacy - are subject to and must thus be given content in the light of the basic values of the Bill. In this regard the courts have an obligation to develop the common law in accordance with the spirit, objects and purport of the Bill of Rights (sec 39(2)).<sup>22</sup>

2.1.11 The entrenchment of fundamental rights (also the right to privacy) strengthens their protection and gives them a higher status in the sense that they are applicable to all law, and are binding on the executive, the judiciary and state organs as well as on natural and juristic persons. Any legal rule or actions by the state or a person may thus be tested with reference to an entrenched right, and any limitation of such a right may occur only if it corresponds with the limitation clause of the Bill of Rights. In the case of an infringement or threat to a fundamental right, the aggrieved or threatened person is entitled to apply to a competent court for appropriate relief, which may include a declaration of rights. For example, a statutory provision limiting the right to privacy in an unreasonable manner may be set aside or interpreted in a restrictive manner.<sup>23</sup>

2.1.12 In the ***Pharmaceutical Manufacturers Association*** case<sup>24</sup> Chaskalson P stated that the common law relating to the control of public power supplements the provisions of the written Constitution but derives its force from it.... There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.

2.1.13 Neethling, Potgieter and Visser<sup>25</sup> argue that in so far as the direct application of the

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22 Cf ***Carmichele v Minister of Safety and Security ao (Centre for Applied Legal Studies Intervening)*** 2001 (4) SA 938 (CC) at 950-956. Sec 39 of the Constitution reads as follows:

**Interpretation of Bill of Rights**

- 39.(1) When interpreting the Bill of Rights, a court, tribunal or forum -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

23 Neethling, Potgieter & Visser ***Delict*** at 21-22; ***Neethling's Law of Personality*** at 75-76.

24 ***Pharmaceutical Manufacturers Association of South Africa ao : In re Ex parte President of the Republic of South Africa ao*** 2000 (2) SA 674 (CC) at 698.

Constitution is concerned, a distinction should, however, be made between a constitutional infringement and a delict.<sup>26</sup> Constitutional remedies are concerned with the acknowledgment and enforcement of fundamental rights whereas a delict is primarily aimed at the recovery of damages. But the two may overlap. In so far as indirect application is concerned, the basic values of the Constitution will always play an important role in determining wrongfulness, causality and negligence in common law disputes. The courts will therefore retain those existing common law actions which are in harmony with the values of the Constitution.<sup>27</sup> Burchell<sup>28</sup> submits that the common law of privacy in South Africa will still provide the lion's share.

2.1.14 In *Bernstein ao v Bester NO ao*,<sup>29</sup> in deciding whether secs 417 and 418 of the Companies Act<sup>30</sup> infringe sec 13 of the interim Constitution, Ackermann J warned that caution must be exercised when attempting to project common-law principles onto the interpretation of fundamental rights and their limitation.<sup>31</sup> He drew a distinction between the two-stage constitutional inquiry into whether a right has been infringed and whether the infringement is justified, and the single inquiry under the common law, as to whether an unlawful infringement of a right has taken place.<sup>32</sup>

2.1.15 There is no South African legislation dealing specifically with the protection of the right to privacy.<sup>33</sup> It is therefore important to evaluate the right to privacy in the light of both the common

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25 Neethling, Potgieter & Visser *Delict* at 22-23.

26 McQuoid-Mason DJ "Invasion of Privacy: Common Law v Constitutional Delict - Does it Make a Difference?" *Acta Juridica* 2000 at 227 (hereafter referred to as "McQuoid-Mason *Acta Juridica*") poses the question whether a breach of a constitutional right to privacy gives rise to a constitutional delict. He furthermore discusses the possibility of creating a new constitutional delict of invasion of privacy.

27 McQuoid-Mason DJ "Privacy" in Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D & Woolman S (eds) *Constitutional Law of South Africa* Juta Kenwyn 1996 Revision Service 5 1999 (hereafter referred to as "McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa*") at 18—2.

28 Burchell JM "Media Freedom of Expression Scores as Strict Liability Receives the Red Card: National Media Ltd v Bogoshi" 1999 *SALJ* 1 (hereafter referred to as "Burchell *SALJ*") at 16.

29 Supra at 790. See also McQuoid -Mason in Chaskalson et al *Constitutional Law of South Africa* at 18 —1; Burchell *Personality Rights* at 373.

30 Act 61 of 1973.

31 Burchell *Personality Rights* at 384, quoting *Bernstein v Bester* supra.

32 It should nevertheless be noted that, dogmatically at least, at common law a distinction is also made between a prima facie invasion of the right to privacy and the justification of such invasion (see *Neethling's Law of Personality* at 221ff, 240ff)

33 Note, however, that the Promotion of Access to Information Act 2 of 2002 (hereafter referred to as "PAIA") provides access on request to his or her personal data to the data subject. This Act, the ECT Act and the National Credit Bill also have interim provisions dealing with the correction of data and the voluntary adherence to data protection principles respectively. These sections are being regarded as interim measures until the Data Protection Bill has been finalised. It should be noted that the promulgation of data protection legislation in South Africa will necessarily result in amendments to these and other South African legislation. Sec 33 of the SA Reserve Bank Act 90 of 1989 furthermore forbids the disclosure of information about customers or shareholders unless this is required for the performance of statutory duties or in court proceedings; Sec 10 of the

law and the Constitution.<sup>34</sup>

2.1.16 In terms of the common law every person has personality rights such as the rights to physical integrity, freedom, reputation, dignity, and privacy.<sup>35</sup>

2.1.17 The locus classicus for the recognition of an independent right to privacy in South African law is considered to be ***O'Keeffe v Argus Printing and Publishing Co Ltd ao***.<sup>36</sup>

2.1.18 In this case Watermeyer AJ correctly interpreted<sup>37</sup> dignitas so widely as to include the whole legally protected personality except corpus (bodily integrity) and fama (reputation). As such dignitas includes not only a single right of personality, but all "those rights relating to . . . dignity". Although it was not explicitly stated by the court, the judgment leaves one in no doubt that the right to privacy is included as one of these "rights".<sup>38</sup>

2.1.19 Very important is the fact that the court, in following ***Foulds v Smith***,<sup>39</sup> correctly rejected the

Local Government : Municipal Structures Act 117 of 1998 prohibits a councillor from disclosing information that would violate a person's privacy. Legislative provisions of this kind are, unfortunately, uncommon.

34 The position regarding the relationship between the Constitution and the common law of privacy as set out above was in general confirmed by the respondents to the Issue Paper. See the submissions received from the Banking Council, Eskom Legal Department, Strata, the Financial Services Board and Andrew Rens.

35 See ***Neethling's Law of Personality*** at chs 3-9.

36 1954 3 SA 244 (C); McKerron RG ***The Law of Delict*** Juta Cape Town 1971 at 54 states: "The case goes further than any previous case in recognising the existence of a right to privacy in South African law." This decision was cited with approval in ***Prinsloo ao v SA Associated Newspapers Ltd ao*** 1959 (2) SA 693 (W) at 695-696; ***Gosschalk v Rossouw*** 1966 (2) SA 476 (C) at 490; ***Mr and Mrs "X" v Rhodesia Printing and Publishing Co Ltd*** 1974 (4) SA 508 (R) at 511-512 (confirmed in ***Rhodesian Printing and Publishing Co Ltd v Duggan*** 1975 (1) SA 590 (RA) at 592). For discussions of the ***O'Keeffe*** case see eg ***Neethling's Law of Personality*** at 50-1,217; Joubert WA "Die Persoonlikheidsreg: 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" 1960 ***THRHR*** (hereafter referred to as "Joubert 1960 ***THRHR***") at 26-27, 39 ff; Van der Merwe NJ and Olivier PJJ ***Die Onregmatige Daad in die Suid-Afrikaanse Reg*** Van der Walt Pretoria 1989 (hereafter referred to as "Van der Merwe and Olivier") at 449; McQuoid-Mason DJ ***The Law of Privacy in South Africa*** Juta Johannesburg 1978 (hereafter referred to as "McQuoid-Mason ***Law of Privacy***") at 89-90. Here a photograph of an unmarried woman was published without her consent as part of an advertisement for rifles, pistols and ammunition. She instituted an action on the ground that the publication infringed her right to privacy.

37 Various writers agreed: ***Neethling's Law of Personality*** at 50-1,217; cf also McQuoid-Mason ***Law of Privacy*** at 124-125.

38 This conclusion was also reached in ***Gosschalk v Rossouw*** supra at 490-491. Corbett J stated with reference to ***O'Keeffe***: "The rights relating to dignity include, it would seem . . . a qualified right to privacy." Cf also ***Mr and Mrs "X" v Rhodesia Printing and Publishing Co Ltd*** supra at 512; ***Sage Holdings Ltd ao v Financial Mail (Pty) Ltd ao*** 1991 (2) SA 117(W) at 128-131; ***S v Bailey*** 1981 (4) SA 187 (N) at 189; cf however Joubert 1960 ***THRHR*** at 40. In ***Mr and Mrs "X" v Rhodesia Printing and Publishing Co Ltd*** supra at 513, Davies J simply stated: "It is clear that there is a qualified right to privacy." In this decision (512) the definition of privacy, as deduced from par 867 of the American ***Restatement of the Law*** was accepted. Privacy is, namely, a person's "interest in not having his affairs known to others or his likeness exhibited to the public . . ."

39 1950 (1) SA 1 (A) at 11; see also ***Neethling's Law of Personality*** at 50,217.

view that contumelia in the sense of "insult" is the "essence of an iniuria".<sup>40</sup>

2.1.20 The view that privacy is an independent right was, however, not always held. In a number of early South African criminal cases regarding the protection of privacy,<sup>41</sup> the idea that dignitas, and consequently privacy, should be limited to dignity and accordingly that insult forms an element of this iniuria, was stated. Even private law decisions after the **O'Keeffe** case took a similar approach to the recognition of a right to privacy.<sup>42</sup>

2.1.21 It has, however, been argued<sup>43</sup> that the equation of privacy and dignity should be rejected and that the approach in **O'Keeffe** should be endorsed.<sup>44</sup> Many recent cases (also of the Appeal Court) have by implication followed this approach.<sup>45</sup> Even the Constitutional Court in **Bernstein ao**

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40 **Neethling's Law of Personality** at 217 fn 9 however expresses criticism against the **O'Keeffe** decision, in that it lacks a comprehensive definition of the right to privacy. As a result, identity as a personality interest is equated with privacy. Instances of unauthorised use of indicia of identity for advertising purposes primarily involve violation of identity and not privacy (see chapter 2 on the distinction between identity and privacy).

41 **Neethling's Law of Personality** at 218 refers in this regard to the decision in **S v A ao** 1971 (2) SA 293 (T) as an example. This case concerned the wrongful monitoring of a private conversation. At first glance it would also appear to recognise the independent existence of a right to privacy. Botha AJ accepted, as did the judge in the **O'Keeffe** case, that an iniuria is constituted by the wrongful, intentional infringement of the person, dignity or reputation of another person. Similarly, the interpretation accorded to dignity by the judge was so wide that it encompassed all those aspects of personality accorded legal protection except the person and reputation. Consequently he concluded that "the right to privacy is included in the concept of *dignitas*" and that "there can be no doubt that a person's right to privacy is one of . . . 'those real rights, those rights *in rem*, related to personality, which every free man is entitled to enjoy". Thus, on the face of it, an unequivocal recognition of the right to privacy as an independent personality right. Unfortunately, Botha AJ muddled his approach somewhat when he came to the requirement of intent. He demanded not only the intent to infringe the plaintiff's privacy, but also the "intention to impair the complainant's dignity". He found this intent in the form of *dolus eventualis*: "They must have foreseen the possibility that the complainant could or would be hurt and *insulted* by their conduct, but they acted in reckless disregard of his feelings." Contrary to his view expressed above, Botha AJ hereby restricted dignitas to dignity or honour as a personality interest and negated the independent existence of a right to privacy. If privacy, as such, had been accorded protection, there is not the slightest doubt that the accused had intent in the form of *dolus directus* to violate privacy. See also **R v Holliday** 1927 CPD 395 (Van der Merwe and Olivier at 449) where the plaintiff was spied upon while she was busy undressing. Gardiner J regarded the concept of privacy as implicit in the concept of dignitas. He stated (400): "It is the violation of a man's rights of personality . . . which gives rise to an action of injury. Now among the rights of personality to which under our civilization a woman is entitled, is the right to privacy in regard to her body." The judge, however, equated dignitas with "self-respect" and consequently demanded an "intention to do the insulting act" to found a conviction. (A similar viewpoint appeared from **R v S** 1955 (3) SA 313 (SWA) at 315; **R v R** 1954 (2) SA 134 (N) at 135.) Thus the right to privacy is protected only in so far as an intention to insult is present. The above decisions probably follow **R v Umfaan** 1908 TS 62 where the court clearly stated that dignitas can be infringed only if an element of "degradation, insult or *contumelia*" is present.

42 Eg, in **Kidson ao v SA Associated Newspapers Ltd** 1957 (3) SA 461 (W) (see also **Mhlongo v Bailey** 1958 (1) SA 370 (W) at 372), which concerned the wrongful publication of a photograph of nurses, Kuper J, following **Walker v Van Wezel** 1940 WLD 66, stated clearly, with regard to the iniuria pertinens ad dignitatem, that "a remedy should be given only when the words or conduct complained of involve an element of degradation, insult or *contumelia*" (at 467).

43 See **Neethling's Law of Personality** at 51, 217-8; Joubert 1960 **THRHR** at 41.

44 Joubert already stated this in 1960: see Joubert *op cit* at 41-42.

45 See **Jansen van Vuuren ao NNO v Kruger** 1993 (4) SA 842 (A) at 849; **National Media Ltd ao v Jooste** supra at 271-272; **Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993 (2) SA 451 (A); **Motor Industry Fund Administrators (Pty) Ltd ao v Janit ao** 1994 (3) SA 56 (W) (confirmed on appeal: 1995 (4) SA 293 (A)). These cases recognise the right to privacy of both natural and juristic persons (see **Neethling's Law of Personality** at 219). Andrew Rens also referred the Commission to

*v Bester NO ao*<sup>46</sup> accepted the fact that the common law recognises the right to privacy as an independent personality right which the Courts have included within the concept of dignitas.

2.1.22 The conclusion is therefore that, despite the decisions equating privacy with dignity (or honour), it can safely be accepted that nowadays the right to privacy is recognised by the common law as an independent right of personality<sup>47</sup> and that it has been delimited as such within the dignitas concept.<sup>48</sup>

2.1.23 The enactment of the Constitution,<sup>49</sup> with the express constitutional recognition of the right to privacy in sec 14, independent of the right to dignity in sec 10,<sup>50</sup> furthermore confirms the independent existence of the right to privacy.<sup>51</sup> It hopefully finally lays to rest the possible equation of, and thus confusion between, these two personality rights.<sup>52</sup> Because the South African Constitution protects the right to privacy as a separate right, the conduct and interests so protected may furthermore be distinguished more effectively than in systems where the right is inferred from

***Khumalo ao v Holomisa*** 2002 (5) SA 401 (CC); 202 (8) BCLR 771 (CC) where it states:

It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution. See, however, ***Neethling's Law of Personality*** 28 fn 299, 219 fn 28.

46 Supra at 789.

47 The decision in ***Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*** 1977 (4) SA 376 (T) clearly confirmed this viewpoint. Mostert J stated (at 383-384): "Die reg op privaathed is een van die verskyningsvorms van die breër groep persoonlikheidsregte. In ons regspraak is erkenning aan sowel persoonlikheidsregte as die reg op privaathed as beskermde regte verleen." See again also ***Jooste v National Media Ltd*** 1994 (2) SA 634 (C); ***Financial Mail (Pty) Ltd v Sage Holdings Ltd*** supra; ***Motor Industry Fund Administrators (Pty) Ltd ao v Janit ao*** supra. Cf further the ***Tommie Meyer*** Appellate Division case 1979 1 SA 441 (A) at 455 ff; ***Sage Holdings Ltd ao v Financial Mail (Pty) Ltd ao*** supra at 129-131; ***Boka Enterprises (Pvt) Ltd v Manatse ao NO*** 1990 (3) SA 626 (ZH) at 632; ***Nell v Nell*** 1990 (3) SA 889 (T) at 895 896; cf nevertheless McQuoid-Mason at 125-128.

48 In ***Jansen Van Vuuren ao NNO v Kruger*** supra at 849 Harms AJA explained it thus: "The *actio iniuriarum* protects a person's *dignitas* and *dignitas* embraces privacy. . . Although the right to privacy has on occasion been referred to as a real right or *ius in rem* . . . it is better described as a right of personality."

49 Sec 2 of the Constitution states that the Constitution is the supreme law of the Republic, that any law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.

50 Sec 10 of the Constitution states:  
Everyone has inherent dignity and the right to have their dignity respected and protected.

51 As indicated (supra fn 40), the right to privacy is protected in South African law with reference to natural persons as well as to juristic persons.

52 See ***Neethling's Law of Personality*** at 219 fn 28.

other rights.<sup>53</sup>

2.1.24 It could even be argued that the entrenchment of the right to privacy in section 14 now compels the Government to initiate steps to protect neglected aspects of the right to privacy in South Africa, such as data privacy or the protection of personal information. Section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>54</sup>

## 2.2 Nature and scope of the right to privacy

2.2.1 Of all the human rights in the international catalogue, privacy is perhaps the most difficult to define.<sup>55</sup> Definitions of privacy vary widely according to context and environment.<sup>56</sup> In *Bernstein ao v Bester NO ao*<sup>57</sup> Ackermann J stated:

The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate.

2.2.2 The lack of a single definition should, however, not imply that the issue lacks importance. The need to understand the nature of the right to privacy in order to have legal certainty and protection has always been emphasised. Gross<sup>58</sup> warns that a lack of understanding could have the following effect:

[O]ur ability to articulate and apply principles of legal protection diminishes, for we become

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53 Rautenbach IM "The Conduct and Interests Protected by the Right to Privacy in Section 14 of the Constitution" *TSAR* 2001.1 (hereafter referred to as "Rautenbach 2001 *TSAR*' ) at 122.

54 See *Neethling's Law of Personality* at 271-272; Neethling J "Aanspreeklikheid vir 'nuwe' Risiko's: Moontlikhede en Beperkinge van die Suid-Afrikaanse deliktereg" 2002 65 *THRHR* (hereafter referred to as "Neethling 2002 *THRHR*") at 589.

55 EPIC and Privacy International *Privacy and Human Rights Report* 2002 at 2: The Calcutt Committee in the United Kingdom said that "nowhere have we found a wholly satisfactory statutory definition of privacy". But the Committee was satisfied that it would be possible to define it legally and adopted this definition in its first report on privacy: "The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information" *Report of the Committee on Privacy and Related Matters* Chairman David Calcutt QC, 1990, Cmnd. 1102, London: HMSO at 7.

56 EPIC and Privacy International *Privacy and Human Rights Report* 2002 at 2: In the 1890s, future United States Supreme Court Justice Louis Brandeis articulated a concept of privacy that urged that it was the individual's "right to be left alone". Brandeis argued that privacy was the most cherished of freedoms in a democracy, and he was concerned that it should be reflected in the Constitution (Samuel Warren and Louis Brandeis "The Right to Privacy" 4 *Harvard Law Review* at 193-220 (1890).

57 *Supra* at 787-788.

58 "The Concept of Privacy" 1967 *NYULR* at 34 as referred to by Neethling J "Die Reg op Privaatheid en die Konstitusionele Hof: Die Noodsaaklikheid vir Duidelike Begripsvorming" 1997 60 *THRHR* at 137.

uncertain what it is that compels us towards protective measures and wherein it [privacy] differs from what has already been recognised or refused recognition under established legal theory.

2.2.3 In 1996 Harms JA accepted the following definition of privacy (as proposed by Neethling<sup>59</sup>) in **National Media Ltd ao v Jooste**<sup>60</sup>

Privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private<sup>61</sup> (translation from the Afrikaans)

In the same year the Constitutional Court also referred to Neethling's definition in **Bernstein ao v Bester NO ao.**<sup>62</sup>

2.2.4 Important to note is that, in accordance with this definition a legal subject personally determines the private nature of facts. In addition, he must exhibit the will or desire that facts should be kept private.<sup>63</sup> If such a will for privacy is absent, then a person usually has no interest in the legal protection of his privacy.<sup>64</sup>

2.2.5 As stated above the right to privacy has also now been entrenched in Section 14 of the Bill of Rights in the Constitution. Section 14 reads:

Everyone has the right to privacy, which includes the right not to have –  
 (a) their person or home searched;  
 (b) their property searched;

59 See Neethling J *Die Reg op Privaatheid* (LLD thesis Unisa 1976) (hereafter referred to as "Neethling *Privaatheid*") at 287; *Neethling's Law of Personality* at 32.

60 Supra at 271.

61 This definition was also accepted in *Jooste v National Media Ltd* supra at 645; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* supra at 384; *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549 (T) at 553; cf also *Motor Industry Fund Administrators (Pty) Ltd ao v Janit ao* supra at 60; *Financial Mail (Pty) Ltd ao v Sage Holdings Ltd ao* supra at 462.

62 Supra at 789.

63 *Neethling's Law of Personality* at 31. See also the discussion by Rautenbach 2001 *TSAR* at 116: This definition need not necessarily be determinative of the constitutional meaning of the concept of privacy. The context in which it was formulated may turn out to be different from that of a bill of rights and such difference may require adjustments.

64 See *National Media Ltd ao v Jooste* supra at 271. Rautenbach 2001 *TSAR* at 118 states that there should be a subjective expectation of privacy which must be objectively reasonable, which means that the right is delimited by the "rights of the community as a whole (including its members)". He argues that it may be better to determine the protective ambit of the right to privacy objectively and to accommodate the subjective intentions of those who do not care about their privacy in terms of a waiver of the right.

- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

2.2.6 Section 14 has two parts. The first guarantees a general right to privacy. The second protects against specific infringements of privacy, namely searches and seizures and infringements of the privacy of communications.<sup>65</sup>

2.2.7 In *Mistry v Interim Medical and Dental Council of South Africa*<sup>66</sup> the court assumed that even though breach of informational privacy was not expressly mentioned in sec 13 of the interim Constitution (the forerunner of sec 14 of the current Constitution), it would be covered by the broad protection of the right to privacy guaranteed by sec 13.

2.2.8 The list mentioned in sec 14 is therefore not exhaustive. It extends to any other unlawful method of obtaining information or making unauthorised disclosures (eg the unlawful restoration of computer information which has been erased by its owner, and handing it over to the state for use in a criminal prosecution)<sup>67</sup>.

2.2.9 Section 14 will, however, not only have an impact on the development of the common law action for invasion of privacy. It may also create a new constitutional right to privacy. In giving content to the general substantive right to privacy, courts will, in the first instance, be guided by common law precedents. Secondly they will be influenced by international and foreign

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65 De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* 3ed Juta Kenwyn 2000 (hereinafter referred to as "De Waal et al *Bill of Rights Handbook* 2000") at 267: Usually the two parts are dealt with in separate sections of bills of rights. In South Africa, however, the specific areas of protection form part of the general right to privacy.

66 1998 (4) SA 1127(CC); 1998 (7) BCLR 880 (CC) at para 14.

67 In *Klein v Attorney-General, Witwatersrand Local Division* 1995 (3) SA 848 (W) at 865; 1995 (2) SACR 210 (W) this conduct was held to be a violation of the applicant's right to privacy comprehended by sec 13 of the interim Constitution.

jurisprudence.

2.2.10 Recognition of new areas of the right to privacy may also give rise to new actions for invasion of privacy which will include not only the interests protected by the common law but also a number of important personal interests as against the state.

2.2.11 For convenience the constitutional right to privacy can be divided into three<sup>68</sup> groups.<sup>69</sup>

- (a) protecting privacy against intrusions and interferences with private life;
- (b) protecting privacy against disclosures of private facts; and
- (c) protecting privacy against infringement of autonomy.

2.2.12 All three groups are of importance in this investigation, but it is the first and second groups, especially information privacy, that warrant special attention.

2.2.13 The protection of information privacy generally limits the ability of people to gain, publish, disclose or use information about others without their consent.<sup>70</sup> Individuals therefore have control not only over who communicates with them but also who has access to the flow of information about them.<sup>71</sup>

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68 Cf De Waal et al *Bill of Rights Handbook* at 270 who identify three related concerns which the right to privacy seeks to protect namely:

- a) the right to be left alone;
- b) the right to development of the individual personality; and
- c) informational privacy.

69 McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* at 18---8. In *Financial Mail (Pty) Ltd ao v Sage Holdings Ltd ao* supra at 462 and *Motor Industry Fund Administrators (Pty) Ltd ao v Janit ao* supra at 60 the court held that an invasion of the right to privacy may take two forms: (i) the unlawful intrusion upon the privacy of another; and (ii) the unlawful publication of private facts about a person. See also *Bernstein ao v Bester NO ao* supra at 789; *Neethling's Law of Personality* at 32-33; McQuoid-Mason *Law of Privacy* at 99, McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* at 18---1, 18---8. See further *Case ao v Minister of Safety and Security ao*; *Curtis v Minister of Safety and Security ao* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at 656 as regards protection of autonomy (*Neethling's Law of Personality* at 34-35,220).

70 McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* at 18---11 and the references made therein. During the apartheid era in South Africa there was widespread abuse of rights protecting information. Most of the offensive legislation has been repealed.

71 McQuoid-Mason *Law of Privacy* at 99. Neethling, Potgieter & Visser *Delict* at 333: "Accordingly, privacy may only be infringed by unauthorized acquaintance by outsiders with the individual or his personal affairs." See also *Neethling's Law of Personality* at 33.

2.2.14 It should, however, be remembered that the rights entrenched in the Bill of Rights are formulated in general and abstract terms. The meaning of these provisions will therefore depend on the context in which they are used, and their application to particular situations will necessarily be a matter of argument and controversy.<sup>72</sup>

2.2.15 In terms of sec 39 of the Constitution,<sup>73</sup> when interpreting the Bill of Rights, the values which underlie an open and democratic society based on human dignity, freedom and equality, should be promoted. This means that an exercise is required analogous to that of ascertaining the boni mores or legal convictions of the community in the law of delict.<sup>74</sup>

2.2.16 Of importance is Ackermann J 's dictum in *Bernstein ao v Bester NO ao*<sup>75</sup> where he stated:

The nature of privacy implicated by the "right to privacy" relates only to the most personal

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72 De Waal et al *Bill of Rights Handbook* at 117. In the post-constitutional era the South African Constitutional Court has delivered a number of judgments on the right to privacy relating to the possession of indecent or obscene photographs (*Case and Curtis v Minister of Safety and Security* supra, the scope of privacy in society (*Bernstein v Bester* supra); and searches and information privacy (*Mistry v Interim Medical and Dental Council of South Africa* supra). All the judgments were delivered under the provisions of the interim Constitution as the causes of action arose prior to the enactment of the final Constitution. However, as there is no substantive difference between the privacy provisions in the interim and final Constitutions, the principles remain authoritative for future application.

73 Sec 39 of the Constitution reads as follows:

**Interpretation of Bill of Rights**

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

74 The section furthermore requires reference for purposes of interpretation to international human rights law in general. This is not confined to instruments that are binding on South Africa. A person may also rely on rights conferred by legislation, the common law or customary law. Such rights may not, however, be inconsistent with the Bill of Rights. Although sec 39 provides a starting-point when trying to interpret the Bill of Rights, it requires interpretation itself. The Constitutional Court has therefore laid down guidelines as to how the Constitution in general and the Bill of Rights in particular should be interpreted (see De Waal et al *Bill of Rights Handbook* 2000 at 131 ff). It should be interpreted by first of all determining the literal meaning of the text itself and identifying the purpose or underlying values of the right. A generous interpretation should furthermore be given to the text, and the history of South Africa and the desire not to repeat it should be taken into account. Finally, the context of a constitutional provision should be considered, since the Constitution is to be read as a whole and not as if it consists of a series of individual provisions to be read in isolation.

75 Supra at 789.

aspects of a person's existence, and not to every aspect within his or her personal knowledge and experience.

2.2.17 Earlier he explained it as follows:<sup>76</sup>

In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community.... Privacy is acknowledged in the truly personal realm.

2.2.18 Neethling<sup>77</sup> criticises this meaning of privacy as too "restrictive", especially in regard to data protection where individual bits of information viewed in isolation may not be private, but where the sum total is of such a nature that an individual may want to protect it.<sup>78</sup> Thus in principle compiling the data record and obtaining knowledge thereof constitutes an intrusion into the private sphere.<sup>79</sup>

2.2.19 His criticism was validated by Langa DP in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO*,<sup>80</sup> where the court held that the statements in *Bernstein ao v Bester NO ao* characterises the right to privacy as lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated.

2.2.20 Having said that, Langa DP further held that the right to privacy should not be understood to mean that persons no longer retain such a right in the social capacities in which they act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play.<sup>81</sup>

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76 At 788-789.

77 See Neethling 1997 *THRHR* at 140.

78 See on this *Neethling's Law of Personality* at 270, *Privaatheid* at 358-359; Neethling *Huldigingsbundel WA Joubert* at 112-113; Du Plessis W *Die Reg op Inligting en die Openbare Belang* LLD thesis PU for CHE 1986 (hereafter referred to as "Du Plessis thesis") at 392.

79 This view also appears by implication from the decision in *S v Bailey* supra at 189-190. Here the court held that the compulsory furnishing of information to the state in terms of the repealed Statistics Act 66 of 1976 does amount to a factual infringement of privacy, but that such an infringement is lawful because it is permitted by a statutory provision.

80 2001 (1) SA 545 (CC).

81 Para 16 at 557.

2.2.21 The right to privacy is not absolute. As a common law right of personality it is necessarily limited by the legitimate interests of others and the public interest.<sup>82</sup> As a fundamental right it can be limited in accordance with the limitation clause of the Bill of Rights (sec 36), that is, by a law of general application which includes other fundamental rights.<sup>83</sup> In each case a careful weighing up of the right to privacy and the opposing interests or rights will have to take place.

2.2.22 Any information privacy legislation will therefore have to find a balance between the data subject's fundamental right to privacy as set out in sec 14 of the Constitution on the one hand, and on the other hand, other persons' legitimate needs to obtain information about the data subject. These needs may be based on the person or institution's fundamental right to choose their trade, occupation or profession freely,<sup>84</sup> their fundamental right to access to information,<sup>85</sup> their undamental right to freedom of expression,<sup>86</sup> as well as other legitimate interests or rights.

2.2.23 In this investigation it is the delicate balance between the right to privacy and these opposing rights and interests that has to be determined.

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82 See *Neethling's Law of Personality* at 240 ff.

83 See Neethling, Potgieter and Visser *Delict* at 19.

84 As set out in sec 22 of the Constitution, which states:  
Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

85 As set out in sec 32 of the Constitution which states:  
(1) Everyone has the right of access to –  
    (a) any information held by the state, and;  
    (b) any information that is held by another person and that is required for the exercise or protection of any rights;  
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

It should be noted that sec 239(b)(ii) of the final Constitution expressly excludes from the ambit of "organ of state" courts and judicial officers. The right to privacy is furthermore likely to constitute an acceptable limitation on sec 32 in certain cases. See also PAIA.

86 As set out in sec 16 of the Constitution which states:  
(1) Everyone has the right to freedom of expression, which includes -  
    a) freedom of the press and other media;  
    b) freedom to receive or impart information or ideas;  
    c) freedom of artistic creativity; and  
    d) academic freedom and freedom of scientific research.  
  
(2) The right in subsection (1) does not extend to -  
    a) propaganda for war;  
    b) incitement of imminent violence; or  
    c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

## 2.3 Infringement of the right to privacy

2.3.1 The elements of liability for an action based on an infringement of a person's privacy are in principle the same as any other injury to the personality, namely an unlawful and intentional interference with a legally protected personality interest - here the right to privacy.

2.3.2 The jurisprudence on the application of standards of reasonableness in the common law and jurisprudence in terms of the limitation clause under sec 36 of the Constitution inform each other.<sup>87</sup>

2.3.3 Although it is possible that a new constitutional delict may emerge in future,<sup>88</sup> the courts seem (in accordance with their obligation in terms of sec 39(2) of the Constitution) to be developing the common law by infusing it with the spirit of the Constitution. It is therefore a hybrid action based on a mixture of the common law and constitutional imperatives.<sup>89</sup> The discussion that follows will therefore focus on the common law elements while at the same time trying to accommodate the constitutional principles.

### a) Essentials for liability

2.3.4 For a common-law action for invasion of privacy based on the *actio iniuriarum* to succeed, the plaintiff must prove the following essential elements: (i) impairment of the plaintiff's privacy, (ii) wrongfulness and (iii) intention (*animus iniuriandi*).<sup>90</sup>

2.3.5 As shown above, the Constitutional Court has pointed out<sup>91</sup> that whereas at common law the test as to whether there has been an unlawful infringement of privacy is a single inquiry, under the Constitution a twofold inquiry is required. In the case of a constitutional invasion of privacy the following questions need to be answered: (a) Has the invasive law or conduct infringed the right to privacy in the Constitution?<sup>92 93</sup> (b) If so, is such an infringement justifiable in terms of the

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87 See discussion above.

88 See discussion above.

89 McQuoid-Mason *Acta Juridica* 2000 at 261.

90 See McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* at 18—2 and the references there.

91 *Bernstein ao v Bester NO ao* supra at 790.

92 Woolman S "Coetzee: The Limitations of Justice Sach's Concurrence" 1996 *SAJHR* 12.1 99; *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 BCLR 665 (CC) at para 100.

requirements laid down in the limitation clause (sec 36) of the Constitution?<sup>94</sup> For this reason the Constitutional Court has cautioned against simply using common law principles to interpret fundamental rights and their limitations.<sup>95</sup>

2.3.6 Rights cannot be overridden simply on the basis that the general welfare will be served by the restriction. The reasons for limiting a right need to be strong, as opposed to concerns that are trivial.<sup>96</sup> They should also be in harmony with the intrinsic values set out in the Constitution.<sup>97</sup> In determining the current modes of thought and values of the community, the *boni mores* or convictions of the community regarding what is constitutionally right or wrong are of particular importance. This is a test analogous to that of the delictual unlawfulness inquiry under the common-law *actio iniuriarum*.<sup>98</sup>

(i) Invasion of privacy

2.3.7 The concept of privacy was defined earlier and applies to both common law and constitutional infringements of the right to privacy.<sup>99</sup> In terms of the common law the courts in South Africa have regarded invasion of privacy as an impairment of dignitas under the *actio iniuriarum*.<sup>100</sup>

2.3.8 In order to establish an infringement of the constitutional right to privacy the plaintiff will have to show that he or she had a subjective expectation of privacy which was objectively reasonable.<sup>101</sup>

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93 Sec 36(2) states that only laws conforming to the test for valid limitations in sec 36(1) can legitimately restrict rights. However, the subsection adds that rights can be justifiably limited in terms of "any other provision of the Constitution". In general, however, the courts will be reluctant to assume that provisions in the Constitution are contradictory and will, if possible, construe apparently conflicting provisions in such a way as to harmonise them with one another.

94 **S v Makwanyane** supra at para 102.

95 McQuoid- Mason **Acta Juridica** 2000 at 246. See however supra fn 28.

96 **Edmonton Journal v Alberta (Attorney General)** 1989 64 DLR 4<sup>th</sup> 577 (SCC) at 612.

97 Devenish GE "The Limitation Clause Revisited - The Limitation of Rights in the 1996 Constitution" 1998 **Obiter** 256 at 263.

98 See **Neethling's Law of Personality** at 54-56; Burchell **Personality Rights** at 416.

99 McQuoid-Mason **Acta Juridica** at 247.

100 See discussion above regarding the recognition of privacy as a separate right.

101 This is analogous to the common law understanding of a wrongful infringement of the right to privacy, namely a factual infringement of privacy (acquaintance with private facts contrary to a person's determination and will), which is in conflict with the legal norm of *boni mores* and therefore unreasonable (see **Neethling's Law of Personality** at 221).

An individual's expectation of privacy must be weighed against the conflicting rights of the community. Such expectations may also be tempered by countervailing fundamental rights, such as freedom of expression or the right to access to information.<sup>102</sup>

2.3.9 Invasions of privacy have been broadly divided into intrusions into (including acquisition of information) or interferences with private life, and disclosures or revelations of private information. These infringements of the right to privacy are sometimes referred to as substantive and informational privacy rights respectively.<sup>103</sup>

2.3.10 The question whether the processing of information of an individual infringes the right to privacy of that individual is factual and will be determined in each case separately. The privacy of the individual may be infringed by the collection and storing of personal information (which amount to an intrusion into privacy), as well as by the use and communication of personal information (which amount to a disclosure of privacy).

(ii) Wrongfulness

2.3.11 In order to found delictual liability in terms of the common law for the infringement of privacy, the conduct in question must be wrongful, and this is determined using the criterion of reasonableness or the norm of boni mores. Thus before it can be said that the practices of the data industry constitute a wrongful invasion of privacy or identity, it must appear not only that these interests were violated in fact,<sup>104</sup> but also that such violation was contra bonos mores or

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102 McQuoid-Mason *Acta Juridica* at 247. To determine whether the constitutional right to privacy has been infringed by a search, in *Mistry v Interim Medical and Dental Council of South Africa* supra at para 4, the Constitutional Court took into account the following factors:

- the substance of the communication was merely that a complaint had been made and that an inspection was planned;
- the information had not been obtained in an intrusive manner but had been volunteered by a member of the public;
- it was not about intimate aspects of the applicant's personal life but about how he conducted his medical practice;
- it did not involve data provided by the applicant himself for one purpose and used for another;
- it was information which led to a search, not information derived from a search; and
- it was not disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld, but was communicated only to a person who had statutory responsibilities for carrying out regulatory inspections for the purpose of protecting the public health, and who was himself the subject to the requirements of confidentiality.

103 McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* at 18---4. Cf also the reference above fn 64 to infringement of autonomy.

104 In other words, that there was unauthorised acquaintance with private facts.

unreasonable.<sup>105</sup>

2.3.12 The acquaintance with private facts should therefore not only be contrary to the subjective determination and will of the prejudiced party, but at the same time, viewed objectively, also contra bonos mores. In the field of the protection of privacy, the boni mores or convictions of the community regarding what is delictually right and wrong is of particular importance in all countries as a criterion for wrongfulness.<sup>106</sup> This view is also apparent in South African case law.<sup>107</sup>

2.3.13 It has been pointed out, however, that “legal protection of private facts is extended to ordinary or reasonable sensibilities and not to hypersensitiveness.”<sup>108</sup> Therefore the courts will not protect facts whose disclosure will not “cause mental distress and injury to anyone possessed of ordinary feelings and intelligence”.<sup>109</sup>

2.3.14 This subjective-objective approach is similar to that of the Constitutional Court, which has held that a person’s subjective expectation of privacy will only have been wrongfully violated if the court is satisfied that such expectation was objectively reasonable.<sup>110</sup>

2.3.15 In determining the current modes of thought and values of any community the courts may be influenced by its statute law. It is also clear that the Constitution - and its spirit, purpose and objects

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105 See *Neethling’s Law of Personality* at 221, 273-274.

106 Joubert WA *Grondslae van die Persoonlikheidsreg* Balkema Cape Town 1953 at 136 says: “Daar is min gebiede van die persoonlikheidsreg waar die opvatting van die gemeenskap so ’n groot rol speel by die bepaling van die omvang van die reg as in die geval van die reg op privaatheid.” See also idem at 143-144; Van der Merwe and Olivier *Onregmatige Daad in Suid Afrikaanse Reg* at 449; cf McQuoid-Mason *Law of Privacy* at 118-122.

107 See eg *S v A* *ao* supra at 299 where Botha AJ set the limits of the right to privacy according to the “prevailing *boni mores* in accordance with public opinion”. In *Financial Mail (Pty) Ltd ao v Sage Holdings Ltd ao* supra at 463 the Appellate Division held that “in demarcating the boundary between lawfulness and unlawfulness in the field, the Court must have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court; see also *O’Keeffe v Argus Printing and Publishing Co Ltd ao* supra at 248; *Jansen van Vuuren ao NNO v Kruger* supra at 850; *Jooste v National Media Ltd* supra at 645-655; *Motor Industry Fund Administrators (Pty) Ltd ao v Janit ao* supra at 60; *Sage Holdings Ltd ao v Financial Mail (Pty) Ltd ao* supra at 130; *S v I* *ao* 1976 (1) SA 781 (RA) at 788-789; *Rhodesian Printing and Publishing Co Ltd v Duggan ao* at 594-595; cf in general *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* supra at 387. See further *Gosschalk v Rossouw* supra at 492 where Corbett J applied the reasonableness criterion in this regard.

108 *National Media Ltd ao v Jooste* supra at 271.

109 *National Media Ltd ao v Jooste* supra at 270; *Financial Mail (Pty) Ltd ao v Sage Holdings Ltd ao* supra at 462.

110 McQuoid-Mason *Acta Juridica* at 232 and the references therein; *Neethling’s Law of Personality* at 221; See also supra fn 96.

- will play a major role in determining the “new” boni mores of South African society.<sup>111</sup> Thus, it can be argued that the Bill of Rights “crystallizes” the boni mores of society by providing that an impairment of the right to privacy in the Constitution is prima facie unlawful. However, the Constitutional Court has pointed out that whereas the test for whether an invasion of privacy is unlawful at common law is a single inquiry, under the Constitution a two-fold inquiry is required, and has cautioned against simply using common law principles to interpret fundamental rights and their limitations.

2.3.16 As indicated above, the common law accepts that privacy can be infringed only by an acquaintance with personal facts by outsiders contrary to the determination and will of the person whose right is infringed, and that such acquaintance can take place in two ways only, namely through intrusion (or acquaintance with private facts) and disclosure (or revelation of private facts). However, the Constitutional Court has also added autonomy as an interest protected under the constitutional right to privacy.<sup>112</sup>

2.3.17 It is necessary to examine the question of the unlawfulness of both intrusion into and disclosure of privacy in greater detail.

### *Intrusion*

2.3.18 A violation of privacy by means of an act of intrusion<sup>113</sup> takes place where an outsider himself acquires knowledge of private and personal facts relating to the plaintiff, contrary to the plaintiff's determination and wishes.<sup>114</sup> This is also applicable to the collection and storage of personal information. When information relating to a person is collected, the total picture represented by the record of the facts is usually of such a nature that the person in question would like to restrict others from having knowledge thereof despite the fact that some of the information, viewed in isolation, is not “private” in the above sense. Thus in principle the compiling of an information record and obtaining knowledge thereof constitutes an intrusion into privacy.<sup>115</sup>

111 McQuoid-Mason in Chaskalson et al ***Constitutional Law of South Africa*** at 18---3; ***Neethling's Law of Personality*** at 55-56.

112 See the discussion supra.

113 See ***Neethling's Law of Personality*** at 222 ff.

114 For the sake of convenience two types of intrusion can be distinguished, namely acquaintance with private facts (i) where such acquaintance is totally excluded or is limited to specific persons, and (ii) where the acquaintance is permissible to an indeterminate but limited number of persons. The following guidelines may be used to facilitate determining whether an act of intrusion should be regarded as wrongful. In the first group the acquaintance is in principle wrongful unless such acquaintance takes place in accordance with the dictates of human nature and the composition of modern society. On the other hand, in the second group the acquaintance is in principle not wrongful, unless the acquisition is contrary to the dictates of human nature and the composition of modern society. Each case must be judged in its context. See ***Neethling's Law of Personality*** at 225-226.

115 See ***Neethling's Law of Personality*** at 270-271.

2.3.19 Generally speaking no person has to tolerate information concerning him being collected.<sup>116</sup> This would mean that, as a starting-point, the unauthorised collection or storage of personal information should be considered to be in principle *contra bonos mores* and thus *prima facie* wrongful.<sup>117</sup>

2.3.20 Similarly, and this stands to reason, the collection and storage of incorrect or misleading personal information is *contra bonos mores* and therefore wrongful, being an infringement of the right to identity.<sup>118</sup>

#### *Disclosure or revelation*

2.3.21 The infringement of privacy through an act of disclosure arises where, contrary to the determination and will of the plaintiff, an outsider reveals to third parties personal facts regarding the plaintiff, which, although known to the outsider, nonetheless remain private.<sup>119</sup>

2.3.22 It is important to note that the question of an infringement of privacy arises only if the plaintiff is identified with the disclosed facts.<sup>120</sup> If this element of identification is lacking, the disclosure does not relate to a specific person in his state of privacy.

2.3.23 A distinction can be made between the disclosure of private facts which have been obtained through an unlawful act of intrusion into privacy; disclosure of private facts in breach of a confidential relationship; and the mass publication of private facts.<sup>121</sup>

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116 This view is comparable to – and is thus supported by – the principle that the continuous “shadowing” of a person by a private detective or extensive espionage on someone’s activities infringes his right to privacy (see on this **Neethling’s Law of Personality** at 225).

117 See **Neethling’s Law of Personality** at 274.

118 See **Neethling’s Law of Personality** at 258,275.

119 See Neethling **’s Law of Personality** at 41, 274 ff; see also in general Giesker H **Das Recht der Privaten an der eigenen Geheimsphäre** 1905 (hereafter referred to as “Giesker”) at 120 ff. See further the categories of publication of private facts identified by Prosser as referred to by McQuoid-Mason at 170: (i) the contents of private correspondence; (ii) debts; (iii) physical deformities and health; (iv) life-style; (v) childhood background; (vi) family life; (vii) past activities; (viii) embarrassing facts; (ix) confidential information; and (x) information stored in data banks.

120 Giesker at 122; see also Neethling **Privaatheid** at 47, 57, 92-93 on the application of the reasonable man test to determine whether a defamatory publication can be connected to the plaintiff.

121 See **Neethling’s Law of Personality** at 226 ff.

2.3.24 As far as the first is concerned, if the storage of information is in principle wrongful, then it goes without saying – in view of the continuous nature of the wrongful conduct – that the communication thereof to third parties<sup>122</sup> should also be regarded as unlawful.<sup>123</sup>

2.3.25 Secondly, disclosure of private facts in breach of a confidential relationship is in principle wrongful. But it must be certain that such a relationship exists. Our law recognises, for example, the relationships between doctor and patient, banker and client, legal representative and client and spiritual advisor and congregant.<sup>124</sup> These examples mentioned should, however, not be regarded as a *numerus clausus*.<sup>125</sup> Whether a specific relationship deserves protection will depend entirely on the surrounding circumstances. Giesker<sup>126</sup> can be supported in this regard. He suggests that the more necessary it is for a person to impart the private facts to the outsider, the more pressing the protection against the disclosure of those facts to third parties by the outsider. Apart from these instances, a confidential relationship may also arise where there is an agreement between the parties that the private facts disclosed will be confidential or secret (*Geheimhaltungsvertrag*).<sup>127</sup> In such instances disclosure of the private facts will, besides breach of contract, also constitute an infringement of the right to privacy.<sup>128</sup>

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122 Which amounts to a disclosure of private facts (see *Neethling's Law of Personality* at 274).

123 This view is supported by the rule that, eg, the disclosure of the contents of stolen private documents is wrongful (see *Neethling's Law of Personality* at 226).

124 See *Neethling's Law of Personality* at 227ff.

125 Other examples which can be mentioned here are those between husband and wife, employer and employee, and teacher and pupil: see Neethling *Privaatheid* at 204.

126 At 131. For Maass HH *Information und Geheimnis in Zivilrecht* 1970 at 55 a legal duty to keep private facts secret also exists where someone is necessarily dependent upon taking another person into his/her confidence. See *Neethling's Law of Personality* at 228.

127 See Giesker at 129 ff; *Neethling's Law of Personality* at 228. It is obvious that the agreement must be valid (Giesker at 142).

128 Apart from confidential relationships, a duty not to disclose private facts in the present circumstances – ie where an outsider acquired authorised knowledge of the facts involved – may also arise in certain circumstances of authorised fixation or embodiment of the facts (by eg photography or tape-recording). Unauthorised disclosure of the embodied facts (eg the photograph) may then nevertheless be wrongful. An example can be found in *Culverwell v Beira* 1992 (4) SA 490 (W) where the alleged threatened disclosure of photographs of a naked woman taken by her lover was at stake. The court held that the woman had no legal basis to claim from her lover delivery of the photographs and negatives, or to prevent him from making copies from the negatives, since he was the owner thereof. She could not succeed merely because of the intimate and private nature of the photographs. However, the court by implication found that a disclosure of the photographs would be wrongful unless justified (see *Neethling's Law of Personality* at 228 fn 95). This decision can be supported, since the violation of privacy by disclosure of embodied private facts is often – as was the case in casu – of a much more serious nature than the mere disclosure of knowledge about such facts).

2.3.26 Thirdly, the mass publication of private facts is in principle wrongful.<sup>129 130</sup>

2.3.27 It stands to reason that the use and disclosure of false or misleading information should also be wrongful – that such conduct is contra bonos mores requires no argument.<sup>131</sup>

iii) Intention

2.3.28 Apart from the wrongfulness of the infringement of privacy, the general rule is that intent or animus iniuriandi is also required by the common law before liability can be established.<sup>132</sup> This means that the perpetrator must have directed his will to violating the privacy of the prejudiced party (direction of the will), knowing that such violation would (possibly) be wrongful (consciousness of wrongfulness). In the absence of any of these elements, there is no question of intent.<sup>133</sup> Where, for example, a person bona fide but incorrectly believes that she is entering her own hotel room, the intent to infringe privacy is certainly lacking<sup>134</sup> and she should go free.<sup>135</sup>

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129 See *Neethling's Law of Personality* at 231 ff.

130 The following guidelines may be used to facilitate the determination of whether an act of disclosure should be regarded in principle as wrongful. First, the disclosure of private facts acquired through a wrongful act of intrusion is in principle always wrongful. Similarly, the mass publication of private facts will always infringe the right to privacy. On the other hand, the disclosure of private facts to individuals or to small group of persons does not infringe the right to privacy unless there exists a specific confidential relationship. Such a relationship does not emerge solely from the necessity of disclosure of private facts to another person, but also from an agreement to secrecy. In either event the act should be judged in context, taking into account all the surrounding circumstances (see *Neethling's Law of Personality* at 236). The question of the protectability of the so-called letter secret should also be assessed according to the above principles. Therefore, apart from intrusion and mass publication, the letter secret should be protected against disclosure only if a special confidential relationship came into being between sender and receiver.

131 See supra fn 113 as to violation of identity (see also *Neethling's Law of Personality* at 275).

132 See *Jansen van Vuuren ao NNO v Kruger* supra at 849 (see also at 856-857) where Harms AJA opined that as a general rule, and irrespective of onus, a plaintiff who relies on the actio iniuriarum must allege animus iniuriandi. Cf *S v A ao* supra at 297 where it was held that the accused had intention in the form of dolus eventualis. Cf also *Kidson ao v SA Associated Newspapers Ltd* supra at 468 where Kuper J stated that "the reference in the article was intentional and in my view the existence of animus iniuriandi must be presumed". See further McQuoid-Mason *Law of Privacy* at 100 ff; Neethling *Privaatheid* at 256-257.

133 Cf *Neethling's Law of Personality* at 57-59, 252-253.

134 See also McQuoid-Mason *Law of Privacy* at 236 ff; cf *Littlejohn v Kingswell* (1903) 13 CTR 154 at 159; *S v Boshoff ao* 1981 (1) SA 393 (T) at 396-397. Cf further *Jansen van Vuuren ao NNO v Kruger* supra at 856-857 where absence of consciousness of wrongfulness was also raised (unsuccessfully).

135 In this regard the decision in *S v I ao* supra deserves closer scrutiny. Beadle CJ required (at 787) for the lawfulness of spying on the activities of a spouse by the other spouse in order to protect his or her interest in obtaining evidential material regarding suspected adultery, inter alia that the spying had to take place in the belief, which had to be based on reasonable grounds, that the privacy of the guilty party only is violated. It is submitted that this requirement has no role to play in

2.3.29 Animus iniuriandi is presumed as soon as wrongful infringement of privacy has been proved.<sup>136</sup> The defendant may then rebut the presumption.<sup>137</sup>

2.3.30 However, for policy reasons the courts have tended not to require the element of “consciousness of wrongfulness” as an element of animus iniuriandi in wrongs touching on the liberty of the subject, such as wrongful arrest or detention, or wrongful attachment of goods. In such cases it is not open to defendants to argue that they were ignorant of the wrongfulness of their acts, and strict liability is imposed.

2.3.31 A possible effect of the Constitution on the concept of animus iniuriandi might be to regard certain of the aspects of the right to privacy mentioned in sec 14 as so fundamental and important to South Africa’s new democratic society that strict liability should be imposed in the same way as has been done for unlawful arrest, detention and attachment under the common law.<sup>138</sup> The result would be that in such cases it would not be open to defendants to show that they did not know that they were acting unlawfully by infringing a constitutional right. It has been argued that this modification of animus iniuriandi in cases involving breaches of constitutionally protected rights would accord with the “spirit, purport and objects” of the Bill of Rights.<sup>139</sup>

2.3.32 Neethling<sup>140</sup> is indeed of the opinion that the collection and use of personal information (especially by electronic databases) create such an enormous threat to the personality of the individual that it would be fair to hold the data industry accountable even without having to prove

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establishing the wrongfulness of the violating conduct. If it is clear that if one spouse was definitely involved in an adulterous relationship and the violation of privacy was reasonable, such violation is lawful irrespective of whether it occurred in the belief on reasonable grounds that the privacy of the guilty party only is violated. The presence of such a belief, whether reasonable or not, is relevant to the intent requirement of the offence concerned. Therefore, where the spouse believes that she infringes the privacy of the guilty party only – in other words, that she is acting lawfully – and the act of violation is indeed wrongful, consciousness of wrongfulness and accordingly intent is lacking.

136 See *Kidson ao v SA Associated Newspapers Ltd* supra at 468.

137 As far as liability of the mass media for the infringement of privacy is concerned, cf *Neethling’s Law of Personality* at 166-168; Neethling, Potgieter and Visser *Delict* at 337 fn 104, 348 fn 205 for an evaluation of the present negligence liability of the press for defamation in the light of the constitutional right to freedom of expression. What is said there applies mutatis mutandis to the protection of privacy.

138 In terms of the Constitution fault is not a requirement for an action based on the infringement of the constitutional right to privacy. Thus strict liability may be imposed upon a defendant who breaches the constitutional right to privacy. In some areas dealt with by sec 14 the constitutional position will be the same as the common law position (McQuoid-Mason *Acta Juridica* at 255). Replacing the traditional fault requirement of the common law action with strict liability will therefore make little difference. However, in respect of other invasions of privacy the imposition of no-fault liability will mean a major departure from the basic principles of the actio injuriarum (McQuoid-Mason *Acta Juridica* at 261).

139 McQuoid-Mason *Acta Juridica* at 234.

140 See *Neethling’s Law of Personality* at 278, 2002 *THRHR* at 584; infra chapter 5 para 3.2.

intent in each case. However, as an alternative to strict liability, he proposes that negligence liability should also be considered.<sup>141</sup>

b) Defences/Justification

2.3.33 Defences to a common law action for invasion of privacy are similar to those for other actions under the *actio iniuriarum*.<sup>142</sup> These defences will be available but will still have to be examined in the light of the Constitution in order to determine whether they are consistent with the provisions of the limitation clause in section 36.<sup>143</sup>

2.3.34 In terms of the Constitution, if the plaintiff establishes that his or her right to privacy has been impaired, the defendant's conduct may not be wrongful if the latter can show that the invasion of privacy was reasonable and justifiable in terms of section 36(1).<sup>144</sup>

2.3.35 According to section 36(1) of the Constitution the rights in the Bill of Rights may be limited only in terms of law of general application which includes the common law. The onus of proving that the infringement is reasonable and justifiable in terms of section 36 rests on the person alleging it and should be discharged on a balance of probabilities.<sup>145</sup>

2.3.36. Sec 36 of the Constitution<sup>146</sup> is a general limitation clause and sets out specific criteria for

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141 See Neethling 2002 *THRHR* at 583-584.

142 McQuoid-Mason *Acta Juridica* at 233 referring to Burchell *Personality Rights* at 388. At common law justification, usually, but not necessarily, arises when the defendant raises a defence. Under the Constitution the enquiry regarding whether the conduct of the defendant was reasonable and justifiable is usually part of the policy-based enquiry concerning unlawfulness. Consequently it has been suggested that the judgment in *National Media Ltd ao v Bogoshi* 1998 4 SA 1196 (A) has begun to blur the distinction between constitutional and common law justifications by introducing the concept of reasonableness during the policy-based inquiry into unlawfulness in cases of publication by the press.

143 See discussion above.

144 McQuoid-Mason *Acta Juridica* at 254.

145 McQuoid -Mason *Acta Juridica* at 254 and the references made therein.

146 Sec 36 of the Constitution provides:

**Limitation of rights**

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and

the limitation of the fundamental rights in the Bill of Rights.<sup>147</sup>

2.3.37 The limitation of constitutional rights for a purpose that is reasonable and justifiable in a democratic society involves the weighing up of competing values, and ultimately an assessment on proportionality. There is no absolute standard that can be laid down for determining reasonableness and justifiability. Whether the purpose of the limitation is reasonable and justifiable will depend on the circumstances in a case-by-case application.<sup>148</sup>

2.3.38 The following five factors are identified in sec 36(1) as making up the proportionality enquiry:

- (a) nature of the right
- (b) the importance of the purpose of the limitation
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

2.3.39 The factors mentioned in sec 36(1) are, however, not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether a limitation is justifiable.<sup>149</sup> Once a court has examined each of the factors, it must then weigh up what the factors have revealed about the purpose, effects and importance of the infringing law on the one hand; and on the other, the nature and effect of the infringement caused by the action or law (a proportionality test) to determine its constitutionality. The court must engage in a balancing exercise and arrive at a global judgment on proportionality, and not adhere mechanically to a sequential check-list.<sup>150</sup>

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(e) less restrictive means to achieve the purpose.

- (1) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

147 Sec 36 is a codification of the approach set out in **S v Makwanyane** *ao* supra. The judge held as follows:

In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

148 **S v Makwanyane** supra at 708.

149 **S v Manamela** *ao* (**Director-General of Justice Intervening**) 2000 (5) BCLR 491 (CC) at 508 and sec 36(1) of the Constitution.

150 **S v Makwanyane** supra at para 104; **S v Manamela** *ao* (**Director-General of Justice Intervening**) supra at 508.

2.3.40 The High Court has explained that the criteria should be applied as follows:<sup>151</sup>

There must be a reason which is justified in an open democratic society based on human dignity, equality and freedom for the infringement of a constitutional right. Further the limitation must be shown to serve a justifiable purpose.

2.3.41 A court is further empowered, horizontally between persons, to develop rules of the common law so as to limit the right in accordance with sec 36(1) (sec 8(3)). This will not necessarily require a complete rewriting of the South African private law. It may, however, have an impact on the style of judicial reasoning. That is, the rules of private law will no longer justify themselves, but must now be justified in terms of our new-found commitment to substantive constitutional values.<sup>152</sup>

2.3.42 The common law defences can be divided into those excluding wrongfulness and those excluding fault.

i) Defences excluding wrongfulness

2.3.43 Examples of traditional grounds of justification that may be relevant to the right to privacy are consent to injury, necessity, private defence, impossibility, public interest and performance in a statutory or official capacity. However, these grounds of justification do not constitute a *numerus clausus* as new grounds may emerge when weighing up the conflicting interests of persons in society.<sup>153</sup>

*Consent*

2.3.44 Consent to infringement of privacy is a unilateral act. Therefore it may be revoked at any time preceding the defendant's injurious conduct.<sup>154</sup> Consent can be given expressly or tacitly.<sup>155</sup>

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151 **Lotus River, Ottery, Grassy Park Residents Association ao v South Peninsula Municipality** 1999 (2) SA 817 (C) per Davis J as referred to by McQuoid-Mason *Acta Juridica* 2000 at 253.

152 Cockrell *Bill of Rights Compendium* at 3A10.

153 See *Neethling 's Law of Personality* at 56.

154 See *Jooste v National Media Ltd* supra at 647. This principle applies as a rule irrespective of an agreement between the parties. In *Jooste* at 647 Olivier J explained it as follows: "Dit is relevant dat die onderhawige toestemming in die vorm van 'n ooreenkoms gegee is. Hierdie feit kan in gepaste gevalle meebring dat die toestemming nie teruggetrek mag word nie . . . Maar waar die reg waarom dit gaan van hoogs persoonlike aard is, soos die persoonlikheidsregte, geld 'n ander benadering. In daardie gevalle, meen ek, kan die toe-stemming herroep word mits dit tydig is. Die teenparty se remedie is om skadevergoeding weens kontrakbreuk te verhaal."

155 See *Neethling's Law of Personality* at 250-1.

2.3.45 In order to be valid, consent must meet certain requirements. Regarding the violation of privacy, it is particularly important that the consent must be voluntary.<sup>156</sup> In addition, the consent must not be contrary to public policy or *contra bonos mores*. For this reason an irrevocable consent to violation of privacy is regarded as invalid.<sup>157</sup>

2.3.46 Where a person has given valid consent to the processing of information regarding himself, there can be no question of wrongfulness. Of course, the consent must satisfy all the requirements for valid consent. For example, it may possibly be argued that consent for the processing of information is invalid if it is set as a condition of employment, or of the continuance of a contract of employment, by an employer.<sup>158</sup> It is a question of fact whether consent was given in a particular instance.<sup>159</sup>

#### *Necessity*<sup>160</sup>

2.3.47 Necessity is present when the defendant by vis major is put into such a position that he can protect his legitimate interests (or those of others) only by infringing another's legal interests (in this particular case, another's privacy). If there was a reasonable alternative available to the defendant, the violating act would not be justified.<sup>161</sup>

2.3.48 In order to protect, further or maintain a certain interest (for example, a business interest), it is often necessary for individuals or institutions (such as potential employers, insurers, sellers, lessors and financiers) to obtain reasonably sufficient information regarding particular individuals.<sup>162</sup> The

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156 Nevertheless there are many cases of violation of privacy where consent is indeed given, but it can seldom be considered voluntary as a result of some form of coercion. This is the case, for example, where a prospective employee, as a prerequisite for employment, is compelled to undergo polygraph or personality tests. Because of such coercion the consent should be invalid and consequently the violation of privacy wrongful. See Neethling *Privaatheid* at 207 on the position in the USA.

157 See Neethling *Privaatheid* at 103-104 on the position in German law.

158 See *Neethling 's Law of Personality* at 251; see also supra fn 151.

159 See *Neethling 's Law of Personality* at 251.

160 See *Neethling 's Law of Personality* at 241-2. It is important to note that either legitimate or lawful interests of individuals or institutions or the public interest may justify the processing of data. However, it should be pointed out that such grounds of justification for the activities of the data industry are relevant only in connection with infringements of privacy. It is unthinkable that an infringement of identity may be justified. Thus the collection and disclosure of false or misleading personal data is always summarily wrongful (see *Neethling 's Law of Personality* at 275).

161 See *Neethling 's Law of Personality* at 241; see also McQuoid-Mason *Law of Privacy* at 233.

162 However, since in many instances it is impracticable for these individuals or institutions to gather such information themselves, the task is performed by institutions (such as credit bureaux) which possess the necessary means and efficiency to process complete data records on a permanent basis. The latter institutions then make the information in their possession available to interested parties (see *Neethling 's Law of Personality* at 275).

need to process information which infringes the privacy of "innocent" data subjects demonstrates a particular application of necessity<sup>163</sup> as a ground of justification; or, if one does not want to classify it as necessity, as an example of the maintenance of legitimate private interests.<sup>164</sup>

2.3.49 For the processing of information to be deemed lawful under the present circumstances, the following requirements must be satisfied:<sup>165</sup>

(i) First it must be certain that the interest which is protected is indeed a legitimate one, in other words, an interest recognised and protected by law. If this is not the case, the processing will be wrongful.<sup>166</sup> The same notion also forms the basis of the view<sup>167</sup> that information may be processed only for one or more specified lawful purposes. Information processing can have a lawful purpose only if the object is to further or protect a legitimate interest;<sup>168</sup> and in order that the interest(s) involved may be identified and defined, the purpose must clearly disclose which interests are at stake. For this reason the purpose must be circumscribed. Without such circumscription or definition it will be very difficult to judge whether or not the processing of information is lawful – in other words, whether a legitimate interest is protected.

(ii) From the foregoing it follows that the information may be used or communicated only for the protection of the legitimate interest(s) involved,<sup>169</sup> and that the use of information in a manner incompatible with this purpose is thus wrongful. Accordingly, there should be a duty of confidentiality on a data controller in so far as the processing of information is not in accordance with the defined purpose.<sup>170</sup>

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163 See *Neethling's Law of Personality* at 241-2, 275.

164 Apart from business interests, other private interests, such as scientific interests, may also justify the processing of data (cf *Neethling's Law of Personality* at 250).

165 Cf generally Neethling *Privaatheid* at 361-363, *Neethling's Law of Personality* at 275-277; cf also McQuoid-Mason *Law of Privacy* 197-200. As will be seen infra (chapter 6), these requirements also appear in foreign statutes and bills on data protection (cf Neethling *Huldigingsbundel WA Joubert* at 118-120).

166 The collection and use may of course be lawful for other reasons – eg where valid consent was given.

167 See the comparative law discussion infra (chapter 6) with regard to "purpose specification" as data protection principle.

168 Which includes the public interest: see the discussion infra.

169 See the comparative law discussion infra (chapter 6) with regard to "limitation" as data protection principle. The ground of justification privileged occasion may also be applicable here (see *Neethling's Law of Personality* at 275 fn 98, 251-2; see also McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* at 18-12 with regard to justification of breach of constitutional privacy). The constitutional right of access to information held by private persons (sec 32(1)(b) of the Constitution) should not adversely affect the present principle since access may only be granted to persons for the exercise or protection of a right (see *Neethling's Law of Personality* at 275 fn 98).

170 A further principle flowing from this is that unauthorised access to processed data by a third party should in principle also constitute a wrongful intrusion into the privacy of the individual involved, even though such outsider may have a legitimate

(iii) Even if it is certain that the processing is for the protection of a legitimate interest, it must still be exercised in a reasonable manner.<sup>171</sup> A requirement which plays an important role in this regard is that the type and extent of the compiled information must be reasonably necessary for,<sup>172</sup> and consequently also connected with (or relevant to), the protection of the interest – in other words, no more information than is necessary for this purpose should be processed.<sup>173</sup> The defined or specified purpose thus also circumscribes the limits of information processing. The activities of credit bureaux may serve as an example. The purpose of these institutions is to process information for the protection of business interests in creditworthiness; thus only information reasonably linked to creditworthiness should be gathered and communicated. Any other personal facts, such as drinking habits, physical or mental health, extra-marital affairs, political views and religious affiliation are usually unnecessary for the specified purpose and therefore should not be processed.<sup>174</sup> If information which is unnecessary for the protection of a legitimate interest is acquired and communicated the bounds of justification are exceeded, and such conduct is unreasonable and wrongful. Whether information is reasonably necessary is a factual question which must be determined with reference to all the relevant circumstances of a particular case.

(iv) An important application of the previous requirement is that obsolete information is generally not reasonably necessary for the protection of a legitimate interest. Therefore information may not be stored or used for longer than is reasonably necessary for the specified purpose.<sup>175</sup>

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interest in the data. See Neethling *Huldigingsbundel WA Joubert* at 118 fn 90 91, *Neethling's Law of Personality* at 276 fn 101.

- 171 The unreasonable protection of an interest is in principle unlawful (cf Van Heerden HJO and Neethling J *Unlawful Competition* Butterworths Durban 1995 at 135-137; Neethling, Potgieter and Visser *Delict* at 112 ff; Van der Merwe and Olivier *Onregmatige Daad in Suid Afrikaanse Reg* at 64 ff); cf also the discussion of *Gosschalk v Rossouw* supra at 490-492 in *Neethling's Law of Personality* at 244 fn 222; infra fn 175.
- 172 Cf again the discussion of *Gosschalk v Rossouw* supra at 490-492 (see previous fn). The comment there applies mutatis mutandis here.
- 173 See the comparative law discussion infra (chapter 6) with regard to "minimality" as data protection principle.
- 174 See also McQuoid-Mason DJ "Consumer Protection and the Right to Privacy" 1982 *CILSA* 135 at 139. Such sensitive personal facts should also not be processed on a permanent basis unless it is clear that such processing is essential for the protection of a legitimate interest (see the comparative law discussion infra (chapter 6) with regard to "sensitivity" as data protection principle). In many instances the acquisition and communication of such data (eg facts of an extra-marital relationship) to an interested party by a private detective agency should be sufficient on a single occasion basis to protect the interests involved (here the interest of a client in collecting and safeguarding evidential material concerning adultery) (cf *Neethling's Law of Personality* at 276 fn 105).
- 175 See the comparative law discussion infra (chapter 6) with regard to "minimality" as data protection principle. Many foreign statutes lay down periods after which data is regarded as obsolete. It is usually stipulated that data which is older than seven years may not be collected (see also Neethling *Huldigingsbundel WA Joubert* at 119 fn 97; McQuoid-Mason *Law of Privacy* at 84 fn 88).

(v) The bounds of reasonableness in relation to protecting a legitimate interest are also exceeded if information which has been obtained in an unlawful manner (such as by reading private documents, illegal wire-tapping or shadowing a person) is processed.<sup>176</sup> Put differently, on account of the continuing wrongfulness in these instances, such information may not be processed because the processing is inseparably linked to the original wrongfulness. If the collection and use of this type of information are regarded as lawful, the data industry will be tempted to employ illegal methods of obtaining information – a practice which cannot be accepted.

### *Public interest*

2.3.50 The state generally protects or maintains the public interest when, by virtue of its greater power, it lays down conditions restricting the rights and freedoms of its subordinates in the public interest. These instances of restriction of the right to privacy fall within the ground of justification of statutory or official capacity.<sup>177</sup>

2.3.51 This ground of justification is especially appropriate in the upholding of law and order, the prevention of crime and disorder, state security, public health, morality and welfare.<sup>178</sup> Obviously, the lawfulness or unlawfulness of a violation of privacy by exercising these capacities must be determined with reference to the relevant permissive statute or common law rule. The right to privacy is violated when the defendant transgresses his capacity.<sup>179</sup> A factor which plays an important role in the question whether or not the particular capacity has been transgressed, is whether the extent of the conduct concerned was reasonably necessary.<sup>180</sup>

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176 See the comparative law discussion infra (chapter 4) with regard to “fairness and lawfulness” as data protection principle. See also the discussion supra.

177 See *Neethling’s Law of Personality* at 243-4, 277-8.

178 In terms of the Interception and Monitoring Prohibition Act 127 of 1992 (which will be replaced by the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002) a judge may, under certain conditions, direct that postal articles or communications transmitted by telephone or in any other manner over a telecommunications line be intercepted, or certain conversations be monitored. Cf also sec 27 (articles other than letters may be opened for examination), sec 35 (articles addressed to persons conducting a lottery or sports pool or dealing in indecent or obscene matter may be opened) and especially sec 118 (detention of postal articles and telegrams suspected of being concerned with offences and action to be taken in connection therewith) of the repealed Post Office Act 44 of 1958. The state is also empowered by statute to gather and use personal information (see eg *S v Bailey* supra at 189-190 on the powers in terms of the repealed Statistics Act 66 of 1976 in this regard - see also *Neethling’s Law of Personality* at 244 fn 219) and (in terms of the Criminal Procedure Act 51 of 1977) to search persons and homes (see on this McQuoid-Mason *Law of Privacy* at 136-141). For further examples of statutory powers justifying a violation of privacy, see in general McQuoid-Mason *Law of Privacy* at 141ff, 145-147, 158 ff, 160 ff, 164 ff, 235. However, it should be noted that the above-mentioned statutory provisions may be in conflict with the Constitution. Statutory limitations of the right to privacy (which is specifically protected in sec 14 of the Constitution), like the ones mentioned above, will have to meet the requirements of s 36 (the limitation clause) of the Constitution.

179 Cf *Neethling’s Law of Personality* at 243-4.

180 A important case in this regard is *Gosschalk v Rossouw* supra. There the court recognised that police questioning may

2.3.52 The processing of personal information to protect the public interest is almost exclusively within the jurisdiction of the state and its organs.

2.3.53 In order for the collection and processing of information to be lawful, certain general requirements must be met. Most of these requirements are analogous to those that apply in the case of the maintenance of legitimate private interests.<sup>181</sup>

(i) First, the state must be expressly authorised by a valid statutory provision to process information.<sup>182</sup> As said, in view of the constitutional protection afforded the right to privacy,<sup>183</sup> any such legislation must be reasonable and justifiable in an open and democratic society based on freedom, human dignity and equality.<sup>184</sup>

(ii) Second, the information may be used or communicated only for the purposes recognised by the statutory authorisation.

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violate a person's right to privacy (at 490-492). However, Corbett J stated very clearly that this right does not apply absolutely, but is restricted especially by statutory capacities (at 491). The judge stated: "The right of the citizen to enjoy these immunities *vis-à-vis* the State, or the Executive, constitute what are often termed 'civil liberties' or 'the liberty of the individual or the subject'. In some countries these rights are enshrined in the Constitution or in a Bill of Rights. This is not so in this country. Here they are enshrined in the common law. At the same time the Parliament of this country may make any legislative encroachment it chooses upon the life, liberty or property of its citizens and it is the function of the courts to enforce Parliament's will." (See also **S v Bailey** supra at 189-190. Of course, this statement is no longer correct as the Constitution now protects fundamental rights in ch 2, and sec 2 of the Constitution provides that the Constitution "is the supreme law of the Republic", and that "law or conduct inconsistent with is invalid".) On the other hand, the statutory capacity of the police to interrogate people is also not unlimited (**Gosschalk** at 491-492). Consequently the individual interest in privacy and the interest of the state in upholding law and order in this regard must, where these interests are in conflict, be reconciled according to the reasonableness criterion. The court formulated its viewpoint thus (at 492): "I consider that police interrogation should be limited to that which is necessary for the investigation of the offence or alleged offence in question and that, in extent, it should not exceed what is reasonable in all the circumstances of the case. In determining what is reasonable in a particular case the Court must seek to reconcile two competing interests, viz (i) that of the individual to be protected from illegal or irregular invasions of his liberties by the authorities, and (ii) the interest of the State to secure information and evidence relating to crimes which have been committed so that justice may be properly administered . . . Neither of these two interests should be allowed to wholly displace the other. It is the duty of the Court to ensure that a fair balance between them is maintained and the basic criterion must be the test of reasonableness as applied to the particular facts of the case". Seeing that the limitation clause (s 36) of the Constitution also makes use of a reasonableness criterion, the position in terms of the Constitution should be basically the same as in the common law in this regard.

181 See generally Neethling **Privaatheid** at 362-363, **Huldigingsbundel WA Joubert** at 120-121; **Neethling's Law of Personality** at 277-8.

182 It is generally accepted that without an express statutory authorisation, data processing by the state should be regarded as unlawful unless the consent of the individual has been obtained (see Neethling **Huldigingsbundel WA Joubert** at 120 fn 104). This principle is further supported by the fact that the constitutionally entrenched right to privacy may only be limited by a statutory rule which is in conformity with the limitation clause of the Constitution (sec 36).

183 See the previous fn.

184 See sec 36 of the Constitution. State demands for information which is reasonably required for official statistical, census and income tax purposes are likely to be regarded as reasonable and justifiable. Likewise statutory reporting requirements concerning information about child abuse and mental patients who are dangerous to others are likely to be declared constitutional (see McQuoid-Mason in Chaskalson et al **Constitutional Law of South Africa** at 18---12).

(iii) Third, the protection of the public interest must take place in a reasonable manner, which means that the information must be reasonably necessary for and related to the statutory purpose.<sup>185</sup>

(iv) Fourth, the information may not be processed for longer than is necessary for the statutory purpose.

(v) Fifth, information acquired in an unlawful manner may not be processed. Where the state or its organs exceed their statutory authority, their conduct is wrongful and they will not be allowed to make use of the fruits of such illegality.

2.3.54 If the private or public data controller<sup>186</sup> acts wrongfully in terms of the abovementioned information protection principles, the ordinary delictual remedies,<sup>187</sup> namely the interdict, the actio iniuriarum for obtaining personal satisfaction and the actio legis Aquiliae for recovering patrimonial damages, should be available to the prejudiced person.<sup>188</sup> The actio iniuriarum is an action by which a person claims an amount of money for injured feelings whereas the actio legis Aquiliae is an action by which a person claims an amount of money for actual monetary loss. Fault should not be required in actions for satisfaction or damages. The collection and use of personal information (especially by means of electronic data banks) pose such a serious threat to an individual's personality<sup>189</sup> that it is probably fair and justifiable to hold a information institution liable even where intention or negligence is not present.<sup>190</sup>

### *Private defence*

2.3.55 Private defence is present when the defendant defends himself against another's actual or

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185 Cf the application of the criterion of reasonableness in **Gosschalk v Rossouw** supra at 490-492 (see on this supra fn 175).

186 If any institution (private or public) collects and communicates personal information for statistical purposes, it should take steps to ensure anonymity: in other words, that statistics cannot be identified with a particular individual. If this requirement is not met, the data controller acts unlawfully for the reason that the processing is not reconcilable with the specified purpose (impersonal statistics) (cf the discussion supra).

187 See **Neethling's Law of Personality** at 278; also Faul W **Grondslae van die Beskerming van die Bankgeheim** LLD thesis RAU Johannesburg 1991 at 536-537.

188 See McQuoid-Mason **Law of Privacy** at 198-199.

189 See also Neethling 2002 **THRHR** at 584. See generally on strict liability Neethling, Potgieter and Visser **Delict** at 363 ff.

190 See Neethling **Privaatheid** at 363, **Neethling's Law of Personality** at 278.

imminently threatening wrongful act in order to protect his own legitimate interests or such interests of someone else. Acts of private defence justifying an infringement of privacy seldom occur.<sup>191</sup> Nevertheless, although such situations are not ruled out, this defence is not relevant in the information-protection field.

### *Impossibility*

2.3.56 Where it is reasonably (not physically) impossible for a person to ward off damage to another, he may raise the defence of impossibility which will exclude the wrongfulness of his omission.<sup>192</sup> This defence is particularly apposite with regard to information processing. If a data controller can prove that it has done everything reasonably possible to ensure compliance with the information protection principles, the wrongfulness of its processing will be excluded.<sup>193</sup>

#### (ii) Defences excluding intention

2.3.57 In the common law the general principles of the *actio injuriarum* apply to defences excluding intention. Once the other elements of an action for invasion of privacy have been proved, *animus injuriandi* will be presumed. The evidential burden then shifts to the defendant to show absence of intention.<sup>194</sup>

2.3.58 The categories of the defences which may be used to exclude intention are not closed. They include *rixa*, *jest*, *mistake* and any other defence which shows subjectively that the defendant did not have the intention to injure, such as *insanity* or *intoxication*.<sup>195</sup>

2.3.59 Since fault is not a requirement for an action based on the infringement of a constitutional right to privacy, strict liability may be imposed for breach of this right.

2.3.60 The constitutional right to privacy may be regarded as so fundamental that defendants may not argue that they were ignorant of the unlawfulness of their act. Alternatively, they may be held liable on the basis of negligence if their ignorance was unreasonable.<sup>196</sup>

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191 See *Neethling's Law of Personality* at 242-3.

192 See Neethling, Potgieter and Visser *Delict* at 92.

193 See *Neethling's Law of Personality* at 280 fn 136.

194 McQuoid-Mason *Law of Privacy* at 237 and references to courts cases therein.

195 McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* at 18--8.

196 Cf McQuoid-Mason *Law of Privacy* at 237.

## c) Remedies

2.3.61 The generally accepted main remedies for common law invasions of privacy are: (i) the *actio iniuriarum*; (ii) the *actio legis Aquiliae*; and (iii) the interdict.<sup>197</sup> It has also been decided that the disused common law remedy of a right to retraction and apology should be revived.<sup>198</sup>

2.3.62 In the case of an infringement of or threat to the right to privacy as a fundamental right, in terms of sec 38 of the Constitution the prejudiced or threatened person is entitled to approach a competent court for appropriate relief, including a declaration of rights.<sup>199</sup> Where a delictual remedy will also effectively vindicate the fundamental right to privacy and deter future violations of it, the delictual remedy may be considered to be appropriate constitutional relief and in this way may serve a dual function.<sup>200</sup>

iii) *Actio iniuriarum*

2.3.63 If a person's privacy is wrongfully and intentionally infringed, he may recover sentimental damages or satisfaction (*solatium*) for injured feelings.<sup>201</sup> In privacy cases the plaintiff is being compensated for the emotional suffering as a result of having his or her private life infringed.<sup>202</sup>

2.3.64 The amount of compensation is in the discretion of the court and is assessed on what is fair and reasonable.<sup>203</sup> Factors which may play a role in the assessment of the amount of the satisfaction are still largely absent from case law.<sup>204</sup> Also note that the Constitutional Court has held that additional constitutional punitive damages should not be awarded in terms of the Constitution for

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197 See *Neethling's Law of Personality* at 250-254.

198 See *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W); see also Neethling J and Potgieter JM "Herlewing van die Amende Honorable as Remedie by Laster" 2003 66 *THRHR* (hereafter referred to as "Neethling & Potgieter 2003 *THRHR*") 329 ff; cf McQuoid-Mason *Acta Juridica* at 234 and his reference to Midgley JR "Retraction, Apology and Right of Reply" 1995 58 *THRHR* 288 at 296.

199 Eg, a statute limiting the right to privacy in an unreasonable manner may be set aside or interpreted in a restrictive manner (see Neethling, Potgieter and Visser *Delict* at 22).

200 See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 836-837; Neethling, Potgieter and Visser *Delict* at 23.

201 *Jansen van Vuuren ao NNO v Kruger* supra at 857-858.

202 McQuoid-Mason *Law of Privacy* at 170.

203 See *Neethling's Law of Personality* at 253; *Jansen van Vuuren ao NNO v Kruger* supra at 857-858.

204 In *Jansen van Vuuren ao NNO v Kruger* supra at 857 Harms AJA said: "It is extremely difficult in this matter to make such an award because there are no obvious signposts. Nevertheless, the right to privacy is a valuable right and the award must reflect that fact." But see *Neethling's Law of Personality* at 253-4.

infringements of fundamental rights and freedoms.<sup>205</sup> But because of the constitutional entrenchment, the amount of satisfaction may nevertheless be increased.<sup>206</sup>

ii) Actio legis Aquiliae

2.3.65 Where the plaintiff has also suffered actual monetary loss as a result of the violation of privacy, he could recover damages by means of the Aquilian action. Negligence is sufficient for liability.<sup>207</sup>

iii) Interdict

2.3.66 Where a person is confronted with a threatening or continuing infringement of his or her right to privacy, an interdict should be obtainable.<sup>208</sup> Fault on the part of the perpetrator is not a requirement.<sup>209</sup>

2.3.67 The impact of the Constitution has been to make the courts more circumspect in granting interdicts which impose a prior restraint on other fundamental rights (eg freedom of expression) because such constraints are regarded as bearing a heavy presumption against constitutional validity.<sup>210</sup> Otherwise they do not require a different approach from the previous common law position.<sup>211</sup>

iv) Retraction and apology

2.3.68 It was assumed that this Roman-Dutch law remedy had fallen into disuse in South African law. Now the remedy has been revived.<sup>212</sup> This revival can be supported for various reasons, inter

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205 McQuoid-Mason *Acta Juridica* 2000 at 235 and the reference to *Fose v Minister of Safety and Security* supra at paras 69-73 per Ackermann J.

206 Cf *Africa v Metzler* 1997 (4) SA 531 (NmHC) at 539; see also Neethling, Potgieter and Visser *Delict* at 21.

207 See *Neethling's Law of Personality* at 254.

208 See *Rhodesian Printing and Publishing Co Ltd v Duggan* ao supra.

209 See in general Neethling, Potgieter and Visser *Delict* at 260-261.

210 *Mandela v Falati* 1995 (1) SA 251 (W) at 259-60.

211 McQuoid-Mason *Acta Juridica* at 236.

212 See *Mineworkers Investment Co (Pty) Ltd v Modibane* supra.

alia because it is in conformity with the Bill of Rights, achieving a fairer balance of the fundamental rights to freedom of expression and a good name.<sup>213</sup> It may, in appropriate circumstances, also be “an appropriate remedy” for the protection of the right to privacy. A prompt and unreserved apology could also be a factor affecting the determination of the reasonableness (wrongfulness) of an act,<sup>214</sup> as well as a factor in the assessment of the amount of satisfaction.<sup>215</sup>

## 2.4 Conclusion

**2.4.1 As stated in Chapter 1 above,<sup>216</sup> information protection is an aspect of safeguarding a person’s right to privacy. The so-called traditional principles examined in this Chapter should, therefore, be fully utilised. These principles are based on the ordinary delictual principles as influenced by the Constitution which regulate the area of privacy protection in South African law (the principles regarding the *actio iniuriarum*). Information protection should be seen merely as a particular application of those principles.**

**2.4.2 The Commission submits that effective information protection will, however, only be achieved through regulation by legislation.<sup>217</sup>**

**2.4.3 Firstly, in view of the inherent conservatism of the courts, as well as the fact that the protection of privacy is, in a sense, still in its infancy in South African law, it is improbable that the application of the information principles by the courts will occur often or extensively enough in the near future to ensure the protection of personal information.<sup>218</sup> Moreover, since the major engine for law reform should be the legislature and not the judiciary, and, as will be seen, the introduction of a information protection regime will not merely involve incremental changes of the common law but radical law reform, it is a task for the legislature.**

**2.4.4 Secondly, the individual should also be able to exercise a measure of active control over his personal information.<sup>219</sup> In fact, the traditional protective measures have little value if**

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213 See Neethling & Potgieter 2003 *THRHR* at 333.

214 McQuoid-Mason *Acta Juridica* at 236 referring to Burchell *Personality Rights* at 496.

215 See Neethling and Potgieter 2003 *THRHR* at 333.

216 Para 1.2.2 and further.

217 See *Neethling’s Law of Personality* at 272-3 where these arguments are set out.

218 See also Neethling 2002 *THRHR* at 589.

219 This encompasses the following: A person should be entitled to -- (i) be aware of the existence of processed data on himself processed by a data controller; (ii) be aware of the purpose(s) for which such data is processed; (iii) be afforded reasonable

there is no active individual control over the processing of personal information. The active control principles, however, differ completely from traditional privacy protection under the *actio iniuriarum* and therefore are unique in the field of personality protection.<sup>220</sup> Consequently such measures can be created by legislation only.

2.4.5 The Commission therefore recommends that formal legislation on the protection of personal information be enacted and that the objects of the Act be set out as follows:

## **CHAPTER 1**

### **General Provisions**

#### **Objects of the Act**

1. (1) The objects of this Act are –

(a) to give effect to the constitutional right to privacy-

(i) by safeguarding a person's personal information when processed by public and private bodies;

(ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution, particularly the right to access to information;

(iii) subject to justifiable limitations, including, but not limited to effective, efficient and good governance and the free flow of personal information, particularly transborder transfers.

(b) to establish voluntary and mandatory mechanisms or procedures which will be in harmony with international prescripts and which will, while upholding the right to privacy, at the same time

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access to data concerning him stored by a data controller; (iv) be informed by a data controller to which third parties the data was communicated by that controller; (v) procure or effect a correction of misleading data at the data controller; and (vi) procure or effect a deletion of false data, or obsolete data, or data obtained in an unlawful manner, or data not reasonably connected with or necessary for the purpose specified at the data controller (see *Neethling's Law of Personality* at 278-9).

220 This active control over personal information can nevertheless be based on the common law and Constitutional Court's recognition of the fact that the right to privacy encompasses the competence of a person to determine for himself (that is, control) the destiny of his private facts or the scope of his interest in his privacy (see *Neethling's Law of Personality* at 31, 273 fn 64; *National Media Ltd ao v Jooste* supra at 271-272; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* supra at 557).

contribute to economic and social development in an era in which technology increasingly facilitates the circulation and exchange of information; and

(c) generally, to promote transparency, accountability and effective governance of **a** public and private bodies by, including, but not limited to, empowering and educating everyone to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies.

(2) When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with these objects.

**Comment is invited.**